Aynsley C.J. referring to section 254 of the Straits Settlement Criminal Procedure Code (which is in *pari materia* with section 261 of our Code) said that

"the power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing."

In pointing out what he described as the danger of acting under section 261 of the Criminal Procedure Code Hashim J. in the case of *Teay Wah Cheong* v. *Public Prosecutor*[3] said that unless

"it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case *ab initio* rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor *vis-a-vis* the credibility of the witness."

The applicant is charged with uttering seditious words. By the very nature of the charge the credibility of witnesses is bound to be of paramount importance and I do not think that this is a proper case where the present president of the Sessions Court may continue from where it was left by his predecessor and act on the evidence already recorded. Furthermore all the 13 prosecution witnesses are readily available to give evidence. The hearing by the previous president lasted only six days and I do not think that a new trial will result in much loss of time and expense.

The applicant's anxiety over the hearing of the criminal trial is understandable. He is facing a serious charge of sedition which in the case of a first offence is punishable with a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment. The applicant is a member of Parliament and if he is found guilty and convicted he stands to be disqualified from being a member of Parliament for five years if upon conviction he is sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars. As I have stated earlier it is my considered opinion that upon the transfer of Encik Abdul Khalid from Seremban on his appointment as a Deputy Public Prosecutor in Kedah he relinquished his powers as a president of the Sessions Court and thereby ceased to exercise any jurisdiction in the trial of the applicant. Even if Encik Abdul Khalid can still be considered as having the powers of a president of the Sessions Court it is I think highly undesirable that he should hear the criminal case any further. It might perhaps have been a different matter if he had remained in the Judicial Department and had been appointed to some other post such as a Senior Assistant Registrar of the High Court but on being appointed a Deputy Public Prosecutor in the Legal Department Encik Abdul Khalid crossed the floor as it were and he can no longer be in a position where he can command the respect of the public as an impartial arbiter if he continues to hear the criminal case. Justice must not only be done but must also be manifestly seen to be done. This is a cardinal principle in the administration of justice and it must override all other considerations. The judiciary in our country is independent of the executive and the honesty and integrity of the officers who preside over the courts are of a high order. Let us not on any occasion therefore dispense justice in a manner which may undermine public confidence in the judiciary.

In the exercise of my revisionary powers I order that the trial of the applicant be heard *de novo* by the present president of the Sessions Court.

Order accordingly.

Solicitors: *Yeap & Co.*

YOUNG KIM SENG v. ONG HONG BOO

[C.A. (Ajaib Singh J.) July 9, 1975]
[Malacca — Civil Appeal No. 1 of 1975]

Landlord and Tenant — Controlled premises — Purchaser new owner — Main tenancy terminated — Position of sub-tenancy — Claim for possession by new owner — Control of Rent Act, 1966.

The respondent was a businessman and owner of the premises in question which he had bought in February, 1957. The premises were built in 1932 and were therefore subject to the operation of the provisions of the Control of Rent Act, 1966.

The respondent claimed possession of the ground floor of the said premises. The appellant, on the other hand, claimed that he was in lawful occupation of the ground floor from 1950 when he became the sub-tenant of the chief tenant of the premises and he claimed protection under the Control of Rent Act, 1966.

The learned magistrate in the lower court held that so long as the tenant was in actual and lawful occupation then the sub-tenant would be protected under the Control of Rent Act but once the tenancy was validly determined by the tenant himself surrendering it back to the landlord then the protection under the Control of Rent Act was no longer there and the appellant thereafter became a trespasser when he was requested to leave the premises.

The appellant appealed from the decision of the learned magistrate ordering him to give vacant possession of the said ground floor of the premises to the respondent.

Held: as the appellant had obtained his sub-tenancy from the tenant of the premises when the latter was a contractual tenant of the landlord he was therefore protected under the Control of Rent Act. The appeal would be allowed with costs.

Case referred to:-

(1) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118.

CIVIL APPEAL.

Andrew Goh for the appellant.

A. K. J. D'Cruz for the respondent.

Ajaib Singh J.: This was an appeal from the decision of the learned magistrate ordering the appellant to give vacant possession of the ground floor of premises No. 2399 Pulau Sebang, Alor Gajah, Malacca, to the respondent. The appellant was also ordered to pay mesne profits until the delivery of possession and costs.

The respondent is a businessman and is the owner of premises in question which he had bought in February 1957. The premises were built in 1932 and are therefore subject to the operation of the provisions of the Control of Rent Act 1966. In his statement of claim in the lower court the respondent alleged that the appellant had wrongfully entered and taken possession of the ground floor of the said premises on or about January 1, 1973 and thereafter wrongfully remained in possession thereof. The respondent had thus been deprived of the use and enjoyment of the said premises and has thereby suffered damage and he claimed possession of the ground floor of the said premises, mesne profits at the rate of $300 per month until delivery of possession of the ground floor, interest and costs. In his defence the appellant admitted the respondent's ownership of the premises but denied his right to the possession of the ground floor. The appellant further denied that he had wrongfully entered and taken possession of the ground floor as alleged and averred that he was in lawful occupation of the ground floor from 1950 when he became the subtenant of the chief tenant of the premises and he claimed protection under the Control of Rent Act.

At the trial of the action in the lower court the respondent said that when he purchased the premises in February 1957 there was already a tenant by the name of Lau Yai Way. Subsequently the tenant informed him that he would be leaving the premises and would no longer be occupying it as from January 1, 1973 and the tenancy was accordingly surrendered to the respondent as from that date. The respondent denied that the appellant was a subtenant of the tenant and said that he had no knowledge of this nor had the tenant indicated to him in any way that the appellant was a subtenant. He further said that after the tenancy had been surrendered by the tenant the appellant wrote to him on January 2, 1973 requesting that he be allowed to rent and occupy the said premises. On January 13, 1973 the respondent replied saying that he was not interested in renting the house to anybody and asked the appellant to be good enough to vacate the house immediately. The appellant ignored this request and the respondent then instructed his solicitors who on his behalf served a notice to quit dated January 22, 1973 on the appellant. The appellant had tendered rent to the respondent by money order at the rate of $60 per month from January 1973 but the respondent refused to accept these rents. In cross-examination the respondent said that when he bought the premises he did not inspect them. His own house was about a quarter of a mile away on the same road and on the same side as that of the demised premises. He said that as businessmen he and the appellant knew each other and that he also knew that the appellant had a photo studio named Seng Photo Studio.

The appellant in his evidence in the lower court said that he had been living on the ground floor of the said premises as from December 1949 and had commenced operating his photo studio known as Seng Photo Studio on the premises as from January 15, 1950 in respect of which he produced a certificate of business registration. He said that he had rented the ground floor from Lau Yai Way who was then the tenant of the said premises and who was living on the top floor. The rent he paid to the tenant was $60 per month. He said that from June 1968 onwards the tenant started giving him trouble and told him to vacate the premises without giving any reason at all. However he did not leave the premises nor did the tenant take any legal action against him. He further said that he paid the monthly rent to the tenant regularly and from June 1968 he paid the rent by way of money orders and he produced the money order receipts as from June 1968 until April 1972 with the exception of two receipts which he said were missing. From May to September 1972 he said that the rents which he had to pay to the tenant were deducted from the $300 deposit that he had given to the tenant when he first commenced his tenancy. For the months of October to December 1972 he paid the rent due in cash which was accepted by the tenant. He was still having his photography business on the premises. In cross-examination he admitted that he knew that Lau Yai Way had surrendered his tenancy. He knew that the tenant had written to the respondent indicating that he was surrendering his tenancy as from January 1 1973 because a copy of that letter was sent to him. He denied however that when the rent was deducted from the $300 deposit his own subtenancy was terminated. He said that he did not agree to take back his deposit but agreed to have it deducted towards rent when the tenant was terminating his own tenancy. The appellant further said in his evidence that when the respondent bought the premises he told the respondent that he was renting the ground floor from the tenant. The respondent came to his shop frequently and he had told him about his being a subtenant on one occasion before he bought the premises and once again after he had bought the premises. With regard to the letter of January 2, 1973 which the appellant had written to the respondent requesting the respondent to allow him to rent and occupy the premises the appellant said that this was done at the request of the respondent with whom he had discussed the matter before sending that letter. He said that the respondent had told him that if he did not write that letter he would not rent the premises to him and he had therefore given an assurance that he could stay there. The appellant called three witnesses in support of his case one of them being his own wife. Their evidence was mainly to the effect that the appellant was living on the ground floor of the premises concerned where a photo studio by the name of Seng Photo Studio was operated by him.

On the evidence before him the learned magistrate held that the respondent knew that the appellant was in occupation of the ground floor of the premises and to that extent he held that the appellant was not a trespasser. He also held that there was no prohibition against subletting the premises by the tenant Lau Yai Way to the appellant. The learned magistrate however held further that when the tenant surrendered his tenancy to the respondent the appellant became a trespasser when he was requested by the respondent to leave the premises but refused to do so. The learned magistrate held that so long as the tenant was in actual and lawful occupation then the subtenant would be protected under the Control of Rent Act but once the

tenancy was validly determined by the tenant himself surrendering it back to the landlord then the protection under the Control of Rent Act was no longer there and the appellant thereafter became a trespasser when he was requested to leave the premises. In his grounds of judgment the learned magistrate referred to the case of *United Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.*[1] and acting as he said on that authority he held that the appellant could not claim any protection under the Control of Rent Act because he occupied the ground floor of the premises only by virtue of the subletting by the chief tenant Lau Yai Way whose tenancy had been terminated. He accordingly gave judgment in favour of the respondent and ordered the appellant to deliver vacant possession of the ground floor to the respondent.

With respect, the learned magistrate appears to have misunderstood the case of *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd., supra.* In that case the tenants of certain premises sublet a portion of the premises to the appellants after the tenants' own contractual tenancy had been lawfully determined and they were holding over only by virtue of the protection afforded to them under section 16(1) of the Control of Rent Act. The statutory protection afforded to the tenants was personal to them and they were in no position to create any lawful subtenancy in favour of the appellants. Subsequently, the tenants gave up possession of the premises and it was held in effect that the subtenants (the appellants) who remained behind had no right to be there any longer and that they could not claim protection under the Control of Rent Act. "The appellants' case," said Ong C.J. in the Federal Court, "would be unassailable had they been given a subtenancy by a contractual tenant. Such a tenant has a common law right or interest out of which could be carved rights of the same nature."

In the present appeal before me the appellant had obtained his subtenancy from the tenant of the premises when the latter was a contractual tenant of the landlord. The appellant was therefore protected under the Control of Rent Act and could be evicted only in accordance with the provisions of that Act.

In the circumstances I allowed the appeal with costs.

Appeal allowed.

Solicitors: *Goh & Khoo; A. K. J. D'Cruz & Co.*

S.A. ANDAVAN v. SIOW MEOW CHOI

[O.C.J. (Wan Suleiman F.J.) September 10, 1975]
[Seremban — Civil Suit No. 133 of 1967]

Land Law — Charge of land — Insufficient security for debt — Plaintiff lodged caveat — Application for order attaching land of defendant — Application of intervener to set aside Order of Court on grounds of irregularity — National Land Code, ss. 323(1) & 335(1) — R.S.C. 1957, O.43 rr.2(3) & 11(c).

The defendant in this case obtained a loan of the sum of $18,000 from the plaintiff through his attorney and charged his land by way of security in 1966. The plaintiff's attorney discovered subsequently that the land, contrary to what the defendant held it out to be, was insufficient security for the debt. The attorney lodged and registered a private caveat against the land on November 1, 1967, and proceeded to foreclose the charge. On May 14, 1971, when the suit came up for hearing, the defendant was absent without reasonable cause, and judgment was entered for the plaintiff. The plaintiff without applying for a prohibitory order proceeded to attach the land and caused a writ of seizure and sale to be issued and for direction for sale. The intervener applied for an order to set aside the order of court attaching the defendant's interest.

Held: (1) the plaintiff did not come under any of the categories of persons at whose instance a private caveat may be entered under the National Land Code, section 323(1);

(2) the plaintiff failed to register a prohibiting order and this was a material irregularity in the conduct of the sale under Order 43 rule 2(3), the Rules of the Supreme Court;

(3) the intervener's application must be allowed and the order of sale set aside.

Cases referred to:-

(1) *Waimiha Sawmilling Co.* v. *Waione Timber Co.* [1926] A.C. 101.

(2) *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.

CIVIL SUIT.

S. Ponniah for the applicant.

Atma Singh Gill for the plaintiff.

Wan Suleiman F.J.: On or about November 23, 1966 the defendant obtained a loan from the plaintiff through his attorney Subramaniam (affidavit — enclosure 85 in C.S. File) of the sum of $18,000 secured by a Charge on land which the defendant held out was planted with high yielding rubber in area 16a. Or. 20p. in Mukim Ampangan, Seremban District.

In early January 1967 plaintiff's attorney, Subramaniam discovered that the land which had earlier been shown to him and thereafter charged to plaintiff was old rubber and not sufficient security for the loan.

Before proceeding to foreclose the charge, on January 11, 1967 he caused a Private caveat to be registered in the Register of Titles on the land under C.T. No. 14493 Lot No. 1682 in Mukim Pantai, in Seremban District in the event of the foreclosure failing to realise the sum secured. This caveat was registered on the same day *i.e.* January 11, 1967.

Subramaniam then applied for foreclosure of the old rubber land. He recovered the sum of $11,057.55 leaving a balance of $6,942.45 for the recovery of which he filed this suit on August 30, 1967.

On August 2, 1967 the Intervener himself registered a private caveat on C.T. No. 14493 Lot No. 1682 and defendant then gave notice of his intention